



## Fast Track Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Funeral Directors and Embalmers, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC65-30-10 et seq.
<b>Regulation title</b>	Regulations for Preneed Funeral Planning
<b>Action title</b>	Rules for termination or modification of an irrevocable trust
<b>Date this document prepared</b>	8/13/10

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.*

Amendments are proposed to specify that, after 30 days, an irrevocable trust set up to fund a preneed funeral contract may only be modified or terminated by a court order in accordance with § 55-544.11 of the Code of Virginia. Currently, the regulations are inconsistent, stating in section 110 that the contract can be cancelled and the buyer can receive a refund if all parties agree; in section 230, where the disclosures with the contract are specified, it states that an irrevocable trust is one that cannot be terminated.

### Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

On August 20, 2010, the Board of Funeral Directors and Embalmers adopted amendments to sections 110 and 230 of 18VAC65-30-10 et seq., Regulations for Preneed Funeral Planning.

**Legal basis**

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.*

**Chapter 24** establishes the general powers and duties of health regulatory boards including the responsibility of the Board of Funeral Directors and Embalmers to promulgate regulations.

*§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:*

- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*

In addition to the general powers and duties of a health regulatory board, the Board of Funeral Directors and Embalmers has specific statutory authority to regulate preneed trust accounts as follows:

**§ 54.1-2803. Specific powers and duties of Board.**

*In addition to the general powers and duties conferred in this subtitle, the Board shall have the following specific powers and duties to: ...*

- 9. Regulate preneed funeral contracts and preneed funeral trust accounts as prescribed by this chapter, including, but not limited to, the authority to prescribe preneed contract forms, disclosure requirements and disclosure forms and to require reasonable bonds to insure performance of preneed contracts.*

The statutory authority for changing the regulatory provision on irrevocable trusts is found in:

**§ 55-544.11. Modification or termination of noncharitable irrevocable trust by consent.**

*A. If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or by the settlor's*

*guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.*

*B. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.*

*C. Upon termination of a trust under subsection A or B, the trustee shall distribute the trust property as agreed by the beneficiaries.*

*D. If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection A or B, the modification or termination may be approved by the court if the court is satisfied that:*

- 1. If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and*
- 2. The interests of a beneficiary who does not consent will be adequately protected.*

**Purpose**

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

The goal of the proposal is to eliminate confusion and inconsistency in the regulations for preneed funeral planning and to provide clear guidance to consumers about the termination of an irrevocable trust agreement. The proposed regulation will protect the welfare of citizens who are consumers of preneed planning.

**Rationale for using fast track process**

*Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

Since there is inconsistency between the regulation in section 110 and the content of disclosures in 230, the reference to the applicable Code section on termination or modification of a non-charitable trust should be clarifying and eliminate the confusion about irrevocable trusts. Therefore, the clarification should not be controversial because it is consistent with the current law.

**Substance**

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)*

Sections 110 and 230 are amended to clarify that an irrevocable trust funding a preneed funeral contract may not be cancelled or modified except in accordance with current law on trusts as stated in § 55-544.11 of the Code of Virginia.

**Issues**

*Please identify the issues associated with the proposed regulatory action, including:*  
 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*  
 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*  
 3) *other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*

- 1) The primary advantage to the public is clarity in the regulations and inclusion of the statutory cite for termination or modification of an irrevocable trust. There are no disadvantages to the public.
- 2) There are no advantages or disadvantages to the Board; the amendments do not affect the regulation of funeral directors but are applicable to their business dealings with consumers.
- 3) There are no other matters of interest.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

There are no federal requirements.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

There are no localities particularly affected.

**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

There are no alternative regulatory methods.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation; b) Since the agency will send notice to the Public Participation Guidelines list via email and conduct a public hearing during a scheduled Board meeting, there will be no additional costs. There will be no on-going costs to the agency since the changes are clarification of current requirements.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>None</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>The individuals and businesses that could potentially be affected would sellers of preneed policies funded by trusts agreements, purchasers of such policies, and funeral establishments named beneficiaries of a trust.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>The agency does not have any estimate of the number of entities that would be affected; only those trust agreements that someone desires to cancel could be potentially be affected. The agency has no information about how many trust agreements are in existence. There are approximately 510 funeral establishments; the</p>

<p><b>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>majority of which would be small businesses. There are no projected costs. The amendments are clarification of existing law on irrevocable trust and are intended to eliminate conflicting language in the regulation.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>Elimination of conflicting regulations and inclusion of a statutory cite that may be useful to the consumer.</p>

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

At the January 12, 2010 meeting of the Board, it was noted that there is inconsistency in regulation on whether an irrevocable trust agreement for preneed funeral planning could be terminated or modified. After discussion, the Board voted to amend the section to clarify that the trust could not be terminated and the contract buyer is not eligible for a refund. That motion was then withdrawn pending further research.

At its April 13, 2010, the Board decided to proceed with amendments to specify that the trust could not be modified or terminated, even upon agreed of all parties. Further research by staff revealed that a section of the Code enacted in 2005 does allow for termination by a court upon agreement of the parties.

Therefore, amendments were presented to the July 8, 2010 Regulatory/Legislative Committee to reflect the Code section that does allow a Circuit Court to grant an order of termination or modification of an irrevocable trust. Sections 110 and 230 were amended for consistency and conformity to the Code at the meeting of the full Board on August 20, 2010.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and*

one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no impact on the institution of the family and family stability.

**Detail of changes**

*Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact in each section. Please describe the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.*

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
110 230	n/a	<p>110- Sets out the regulations for cancellation of a preneed contract</p> <p>230 – Sets out the disclosures for the consumer or contract buyer in the purchase of a preneed contract.</p>	<p>Subsection D current states that after 30 days, a contract buyer may be eligible for a refund only with agreement of all parties. That is in conflict with the disclosures required for preneed contracts (section 230), which state that the contract buyer cannot cancel the contract after 30 days.</p> <p><i>Sections 110 and 230 are amended for consistency in language and for reference to the statute that sets out the process for termination of an irrevocable trust.</i></p> <p><i>§ 55-544.11 specifies that if “the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.”</i></p> <p><i>Therefore, even if the trust is “irrevocable,” it may be terminated or modified with agreement of the parties.</i></p>